

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of NE Colorado-) Application No. 911-022.09
Cellular, d/b/a Viaero Wireless,)
Fort Morgan, Colorado, seeking)
funding approval for recurring) ORDER DENYING APPLICATION
and non-recurring costs of)
Enhanced Wireless 911)
implementation.) Entered: November 13, 2008

BY THE COMMISSION:

On or about February 29, 2008, NE Colorado Cellular, Inc., d/b/a Viaero Wireless (Viaero) filed an application for funding (Application) from the Enhanced Wireless 911 Fund (Fund).

The Application was discussed at the Enhanced Wireless 911 Advisory Board (Board) meeting on April 21, 2008, at which time the Board determined that it needed additional information including detail regarding costs.

The Commission requested additional information on May 9, 2008. Viaero provided additional information on July 8, 2008, without the detailed cost information per county. The Application was discussed at the Board's July 14, 2008 meeting at which time Viaero provided detailed cost information. The Board held a special meeting on August 18, 2008 to consider the Application and additional information provided by Viaero at which time the Board recommended that the Application be denied and that the Commission not fund any Phase II costs for wireless carriers. Hearing before the Commission on the matter was held on October 9, 2008.

E V I D E N C E

The following individuals testified in support of Viaero's Application through written testimony and during the hearing: Nicholas White, Kara Thielen, and Thomas Burnett. Mr. White, general counsel for Viaero, testified generally regarding the Application and supporting documentation; his interpretation of state and federal law and policy with respect to enhanced 911 service; and his interpretation of past Commission dockets relating to the Fund.¹ Ms. Thielen testified generally regarding the services provided by Viaero and its provision of enhanced wireless 911 services.² Although Ms. Thielen's written testimony

¹ Exhibit No. 4; Trans. 8:11 - 23:22.

² Exhibit No. 5; Trans. 24:93 - 6:12.

did not address costs, during her oral testimony Ms. Thielen testified that she believed the costs were eligible for reimbursement from the Fund.³ Mr. Burnett testified generally regarding Viaero's network.⁴

Additionally, the written testimony of Robert Anderson, senior vice president of engineering and technology and CTO for TruePosition and Michael Amarosa, senior vice president for regulatory affairs for TruePosition was provided by Viaero.⁵ Mr. Anderson testified generally regarding the technical aspects of Phase II implementation. Mr. Amarosa provided his interpretation of the FCC's federal policies related to 911. Also entered into the record was a copy of Viaero's Application and supporting documentation⁶, a copy of the transcript of the October 7, 2008 hearing in Application 911-002 regarding the Enhanced Wireless 911 surcharge⁷, a spreadsheet purporting to summarize funding approved by the Commission for PSAPs⁸, an excerpt from the Commission's Annual Report⁹, and a February 16, 2007 letter from Grand Island Emergency Management to Viaero regarding a Wireless Telephone Occupational Tax¹⁰.

Sue Vanicek, director of the Nebraska Telecommunications Infrastructure and Public Safety Department (NTIPS) and Jeffrey Pursley provided written testimony and appeared at the hearing. Ms. Vanicek testified generally regarding her recommendation to deny the funding request and establish a policy against funding Phase II costs for wireless carriers.¹¹ Mr. Pursley testified generally regarding his analysis of the costs submitted by Viaero based upon the supporting documentation provided.

Viaero's cross examination of Ms. Vanicek focused on the history of the various Commission orders relating to 911; the funding provided to public safety answering points (PSAPs); and the basis for her recommendation that Viaero's application be denied. The current balance of the Fund is approximately \$13.6 million and the Commission has approved funding requests of \$2.3 million which have not yet been paid.¹² Ms. Vanicek testified

³ Exhibit No. 5; Trans. 26:13-18.

⁴ Exhibit No. 6; Trans. 36:19 - 47:25.

⁵ Exhibit Nos. 7 and 8, respectively.

⁶ Exhibit No. 3.

⁷ Exhibit No. 13.

⁸ Exhibit No. 9.

⁹ Exhibit No. 15.

¹⁰ Exhibit No. 14.

¹¹ Exhibit No. 10; Trans.

¹² Trans. 52:18-21.

that Viaero currently receives approximately \$28,000.00 per month in reimbursement for Phase I costs, increasing to \$55,745.00 per month once all current Viaero sites are implemented Phase I.¹³ Also, at the time of the hearing, the Commission had received an additional \$1.2 million in funding requests that have not yet been approved or paid out.¹⁴ Additionally, a letter outlining the Board's recommendation was filed with the Commission and made part of the record.¹⁵

Viaero's initial request sought "costs of implementing Phase II enhanced wireless 911 services throughout Viaero's entire existing service area as it will be deployed by the end of 2009, covering an estimated 254 cellular towers."¹⁶ The initial Application included a spreadsheet detailing costs incurred or to be incurred for each quarter from the first quarter of 2008 through the fourth quarter of 2009. Costs associated with the implementation of Buffalo, Keith and Hall Counties during the first quarter of 2008 totaled \$1,651,762.49 of which \$79,028.49 were classified as recurring monthly costs.¹⁷ It is unclear as to whether the \$79,028.49 is the actual amount sought on a monthly basis or whether it is annualized. During the hearing, Mr. White testified that Viaero seeks reimbursement of costs actually incurred in the amount of \$1,050,482.69 related to the implementation of Phase II service in Buffalo, Hall and Keith Counties.¹⁸ It is unclear as to whether any recurring costs were included in that figure. However, based upon the information provided, it does appear that Viaero is seeking some level of recurring costs related to these counties as well. Although the current funding request is for costs incurred in the implementation of Phase II enhanced wireless 911 for three counties, Viaero has estimated that full implementation for all counties in which it currently has towers would cost in excess of \$14 million.¹⁹ However, Mr. Pursley testified that based upon his review of the documentation and conversations with Viaero, full statewide implementation would cost approximately \$9.2 million.²⁰

O P I N I O N A N D F I N D I N G S

¹³ Trans. 54:2-7.

¹⁴ Trans. 52:21-25.

¹⁵ Exhibit No. 12.

¹⁶ Exhibit 4, 4:11-14.

¹⁷ Exhibit 3 Phase II Schedule.

¹⁸ Exhibit 4, 3:7-9; 5:10-15.

¹⁹ Exhibit 3.

²⁰ Trans. 130:7-25.

The Enhanced Wireless 911 Fund "shall be used for the costs of administering the fund and the purposes specified in section 86-465 unless otherwise directed by federal law with respect to any federal funds."²¹

Pursuant to § 86-465, the following purposes **may** be eligible for funding:

(a) Costs incurred or to be incurred by wireless carriers to implement enhanced wireless 911 service pursuant to a service agreement with a public safety answering point or pursuant to a request for service from a public safety answering point. Such costs may include, but not be limited to, the portion of the costs for new equipment used for providing enhanced wireless 911 service, costs to lease another vendor's equipment or services to provide enhanced wireless 911 service, costs to create or maintain any data base or data base elements used solely for enhanced wireless 911 service, and other costs of establishing enhanced wireless 911 service. The portion of the costs of equipment or services used in the wireless carrier's main infrastructure resulting in revenue to the wireless carrier is not eligible for funding;²²

Although § 86-465 provides guidance regarding the types of costs that may be eligible for funding, the Commission retains discretion in determining the costs that will be reimbursed and the allocation of the Funds for the different costs incurred by PSAPs and wireless carriers.

Currently, wireless carriers receive reimbursement for Phase I implementation costs which include costs for database upgrades, trunking infrastructure and purchase, installation, and testing in addition to recurring costs for database management and operation and maintenance of trunks and circuits. These costs continue after the implementation of Phase II and are necessary for Phase II service as well.

With respect to PSAPs, the Fund pays local exchange carrier costs as well as the cost of equipment and software. The Fund also pays for the development and maintenance of mapping data

²¹ Neb. Rev. Stat. § 86-463 (2008).

²² Neb. Rev. Stat. § 86-465(2)(a) (2008).

necessary statewide for the plotting of Phase II location data. However, PSAPs are responsible for rural addressing costs.

The Fund has also established intertandem trunking between Iowa and Nebraska along the eastern stateline to allow for the transfer of Phase II data between PSAPs when necessary to ensure that the proper jurisdiction is dispatching.

Prior to addressing the specifics of Viaero's request, the Commission must determine the underlying policy question of whether wireless carriers should be reimbursed for the nonrecurring and recurring costs of equipment, software, installation, and associated expenses for the implementation of Phase II enhanced wireless 911 service.

The Commission established an interim policy regarding the use of the Fund pending establishment of the funding mechanism required by LB 1222.²³ However, the interim policy did not specifically address funding for the costs requested by Viaero as prior to this Application no wireless carrier had made such a request.

Viaero cited to the legislative history of LB 585 [2001] which established the original Enhanced Wireless 911 Services Act and the federal requirements and policies in place at the time. However, as recognized by Viaero, significant changes in both state and federal law have occurred since then. Therefore, references to earlier requirements and history must be placed in the proper context and are of limited assistance in establishing policy under the existing statutory framework.

Viaero also made great efforts to demonstrate that a significantly larger percentage of the Fund is being used for the installation and maintenance of equipment and software at the PSAPs and for the development of statewide mapping data than that being paid to cover wireless carrier costs. The Commission concedes that the Fund provides a larger percentage of funding for PSAP equipment, software and maintenance and for the development and maintenance of mapping data and the establishment of a statewide data repository than that provided to wireless carriers. These elements of the provision of enhanced wireless 911 service constitute the backbone of the

²³ *In the Matter of the Nebraska Public Service Commission, on its own motion, to establish interim policies for the Administration of the Enhanced Wireless 911 Fund pending Implementation of LB 1222 [2006]*, Docket No. 911-017/PI-116, Progression Order No. 1 (February 13, 2007).

statewide enhanced 911 system. Without complete mapping data or the equipment and software necessary to receive, process, and plot an enhanced wireless 911 call at a PSAP, implementation of Phase II service by any wireless carrier is irrelevant.

Viaero has suggested that such a distribution of funds is discriminatory. However, Viaero has failed to recognize that wireless carriers and PSAPs are not similarly situated entities. With respect to the distribution of Phase II cost recovery, Viaero is being treated in a similar manner when compared to similarly situated parties, i.e. other wireless carriers.

The Fund is not a mechanism for supporting competition in any given marketplace. It is for the purpose of furthering the implementation of enhanced wireless 911 service statewide. Although no other wireless carrier has requested cost recovery for implementation of a Phase II wireless service at this time, the Commission cannot look at Viaero's request in isolation. To ensure that all wireless carriers are treated similarly and that we remain neutral with respect to wireless technology in providing cost recovery, it would be necessary to examine other issues including but not limited to the level of self-recovery actually made and possible for each carrier and the differences in recovery of costs between the various technologies. For example, the Commission would have to determine whether it was appropriate to offset cost recovery granted to a wireless carrier utilizing the GSM technology by the amount of Phase II costs included in a handset from carriers utilizing a GPS handset solution.

The money available is limited. Until such time that the permanent funding mechanism is in place the Commission must be conservative in obligating portions of the Fund to certain costs. Viaero's own estimate of the cost for statewide implementation of its towers alone exceeds the current balance of the Fund. Although, they have limited their request to costs for three counties, the statewide costs for a single carrier must be taken into consideration when deciding whether such costs should be eligible for funding at this time.

Additionally, discrepancies remain between the documentation presented in support of Viaero's request and the amount requested.

Therefore, the Commission finds that Viaero's Application should be denied. Furthermore, the interim policy established in Application No. 911-017/PI-116 should be amended to state that wireless carriers will not receive funding for Phase II

costs at this time. However, any costs currently approved for Phase I service that will continue with the implementation of Phase II will continue to be reimbursed consistent with Commission rules and regulations, the other terms of the interim policy and Commission orders.

The Commission further finds that it should open a separate investigation to determine the level, if any, of Phase II cost recovery should be permitted for wireless carriers with respect to the permanent funding mechanism.

O R D E R

IT IS THEREFORE ORDERED by the Commission that Viaero's Application should be denied.

IT IS FURTHER ORDERED that the interim policy established in Application No. 911-017/PI-116 should be amended to state that wireless carriers will not receive funding for Phase II costs at this time. However, any costs currently approved for Phase I service that will continue with the implementation of Phase II will continue to be reimbursed consistent with Commission rules and regulations, the other terms of the interim policy and Commission orders.

IT IS FINALLY ORDERED that the Commission shall open a separate investigation to determine the level, if any, of Phase II cost recovery should be permitted for wireless carriers with respect to the permanent funding mechanism.

MADE AND ENTERED at Lincoln, Nebraska this 13th day of November, 2008.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chair

ATTEST:

Deputy Director